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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
VERONICA BUTLER,)
Employee) OEA Matter No. 1601-0132-14
)
v.) Date of Issuance: October 27, 2015
)
DISTRICT OF COLUMBIA)
OFFICE OF AGING,)
Agency) MONICA DOHNJI, Esq.
) Administrative Judge

Joseph Mallon, Esq., Employee Representative
Rahsaan Dickerson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 25, 2014, Veronica Butler ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Office of Aging's ("DCOA" or "Agency") decision to terminate her from her position as a Special Assistant to the Executive Director, effective September 3, 2014. Employee was charged with violating the following: (1) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operation, specifically: Absent without official leave;[1] and (2) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operation, specifically: Unauthorized absence.[2] On November 13, 2014, Agency submitted its Answer to Employee's Petition for Appeal.

Following a failed mediation, this matter was assigned to the undersigned Administrative Judge ("AJ") on April 2, 2015. A Status Conference was held in this matter on July 15, 2015. Both parties were present for the scheduled Status Conference. Thereafter, I issued a Post-Status Conference Order on the same day requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties have submitted their respective briefs. After considering the parties' arguments as presented in their submissions to this Office, I have

[1] District Personnel Manual ("DPM") §§ 1603.3(f)(2), 1619.6(b).
[2] DPM §§ 1603.3(f)(2),1619.6 (a). It should be noted that this cause of action – Unauthorized Absence is listed under DPM 1603.3(f)(1) and not DPM 1603.3(f)(2) as stated in the Notice of Final Decision on Proposed Removal. The cause of action is correctly found under DPM § 1619(6)(a) of the Table of Appropriate Penalties.

decided that there are no factual issues in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

OEA has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1) Whether Employee's actions constituted cause for adverse action; and

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was hired as a Transition Coordinator in 2012. In 2013, she was promoted to the position of Special Assistant to the Executive Director, Dr. John Thompson. Employee left work on June 23, 2014, stating that she was not feeling well. On June 24, 2014, Employee's physician, Dr. James Thomas Williams notified Agency that Employee was under his care and should be released from work from June 23, 2014, through June 25, 2014. The June 23, 2014 note further stated that Employee would return to work on June 26, 2014.[3] On July 1, 2014, Agency mailed a letter to Employee, along with the District of Columbia Family Medical Leave Act ("DCFMLA") package. The letter further informed Employee that she and her health care provider have to complete and return the included forms to Agency for consideration.[4] On July 1, 2014, Employee's Psychiatrist, Dr. Rama Prayaga sent Agency a letter stating that Employee was "under his medical care and is released from returning to work from June 26, 2014 until further notice. Mrs. Butler is able to work from home and will contact the Human Resources Specialist to make arrangements for same."[5] On July 14, 2014, Dr. Prayaga sent a second note to Agency stating that Employee will remain under his care until further notice. The note also stated that "…prescription medication and the time spent away from the office has reduced the job related stress. I remain guarded, but I do not believe the symptoms will return. Therefore, I will be releasing her to return to work on Monday, July 21, 2014."[6]

In an email from Employee to Dr. Thompson dated July 17, 2014, Employee stated in pertinent part that "One of the issues leading to my job related stress was the result of needing clarification of my work responsibilities.… I am taking the liberty to list my understanding of my job responsibilities upon my return to work on July 21, 2014."[7] Employee did not return to work on July 21, 2014. On July 23, 2014, Dr. Prayaga again notified Agency that Employee "was advised not to return to work on Monday, July 28, 2014, as had been stated. Please note that a

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[3] Agency's Answer at Exhibit 6 (November 13, 2014).
[4] *Id*. at Exhibit 6
[5] *Id*. at Exhibit 5.
[6] *Id* at Exhibit 7.
[7] *Id* at Exhibit 8.

non-hostile working environment and the absence of unhealthy stress is imperative upon her return. She remains in my care until further notice."[8]

On August 7, 2014, Agency sent out an email as well as an official notice of Absence Without Leave ("AWOL") to Employee for the period of July 28, 2014 to August 8, 2014. This notice further informed Employee that she must immediately provide acceptable documentation sufficient to explain her absences. Employee was required to provide the requested documentation by August 8, 2014. The letter also encouraged Employee to take advantage of FMLA.[9] On the same day, Employee responded to Agency's August 7, 2014, email noting that she was "having a very difficult time responding. Hopefully this will comply with your directives to respond by Friday, August 8, 2014. Actually my physician has forwarded medical documentation establishing my care. I will have him send further documentation after my office visit Friday evening."[10] In an email dated August 8, 2014, Employee was informed by Agency that it had not received any medical documentation from her physician establishing a continued impairment that prevented Employee from carrying out the essential functions of her job for the period of July 28, 2014 to August 8, 2014.[11] Employee responded to the email noting that Dr. Prayaga's office has been advised of Agency's directive, and that she was certain Dr. Prayaga would forward documentation as soon as he could. Employee further stated that she had an appointment with Dr. Prayaga that same evening, and he would be forwarding other documentation after her office visit.[12]

In an affidavit provided by Dr. Prayaga on September 8, 2015, to this Office, he stated that on August 11, 2014, he faxed a doctor's note to Agency, in response to Agency's August 7, 2014, request for documentation confirming Employee's continued mental health treatment. He explained that the note highlighted that "this is an attempt to comply with the Thursday, August 7, 2014 directive for Mrs. Veronica Butler to provide medical documentation establishing that she was still under my care from July 28, 2014 through August 8, 2014. It is stated this documentation should be provided by today, Friday, August 8, 2014. Please note that there will be further medical documentation forwarded after her office visit today." The note was signed and dated August 11, 2014. He also stated that he was treating Employee for anxiety and panic attacks which she suffered as a result of job-related stress and a hostile work environment during the relevant time period.[13]

On August 18, 2014, Agency issued an Advanced Written Notice of Proposed Removal to Employee's address on file for any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations. Specifically, (1) Absent Without Official Leave pursuant to DPM §§1603.3(f)(2), 1619.6(b) and (2) Unauthorized absence, pursuant to DPM §§1603.3(f)(2), 1619.6(a).[14] On August 20, 2014, Employee submitted an Application to Donate Annual Leave to the Annual Leave bank.[15] On August 22,

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[8] *Id*. at Exhibit 9.
[9] *Id.* at Exhibit 10.
[10] *Id*. at Exhibit 11.
[11] *Id*.
[12] *Id*.
[13] Employee's Reply Brief at Exhibit 16 (September 9, 2014). *See also*, Exhibit 15.
[14] Agency's Answer, *supra*, at Exhibit 12.
[15] *Id*. at Exhibit 14.

2014, Agency was notified by Employee's attorney that Employee had invoked her rights for leave under DCFMLA. The letter further stated that any adverse employment decision made against Employee would be deemed to be retaliatory in nature.[16] On August 25, 2014, Employee filed an age discrimination complaint with the EEOC.[17] On August 29, 2014, an Administrative Review of Proposed Notice of Removal was issued.[18] On September 3, 3014, Agency issued a Notice of Final Decision on Proposed Removal, effective September 3, 2014.[19]

Employee's Position

Employee does not deny that she was absent from work for the period of July 28, 2014 through August 8, 2014. However, Employee notes that her absence was excusable since she was under a doctor's care and FMLA. Employee explained that she was unable to work from July 28, 2014 through August 8, 2014, due to issues relating to depression, anxiety and stress caused by the hostile work environment that had been fostered by Agency. Her illness rendered her incapacitated from July 28, 2014 to August 8, 2014.[20]

Additionally, Employee asserts that under DCFMLA, she was not required to advise Agency that she had a disability nor was she required to request accommodation. Employee maintains that there is no evidence that her need for medical leave was foreseeable to her. She was only required to provide Agency notice of her 'need for leave as soon as practicable." Thus, on June 24, 2014, the very day she became ill, she immediately notified her superiors that she was ill and leaving work. And the next day, she provided Agency with a doctor's note excusing her from work until June 25, 2014.[21]

Employee also states that her mental health continued to deteriorate due to the hostile work environment Agency had fostered. She sought continued medical treatment from a psychiatrist, and Agency received no less than four (4) doctor's notes from her psychiatrist, Dr. Prayaga stating that Employee was undergoing treatment and explicitly referenced unhealthy job-related stress Employee was experiencing as a result of her employment.[22] Employee also explains that the doctor's notes put Agency on notice of her serious health condition and the D.C. Department of Human Resources ("DCHR") also advised Agency of Employee's stress and anxiety issues. Thus, Agency cannot credibly claim that it was unaware of Employee's serious health condition, which rendered her unable to perform the functions of her job from June 25, 2014 to August 8, 2014.[23] Furthermore, Employee maintains that her absence during this time period, which includes July 28, 2014, to August 8, 2014, is protected by DCFMLA; cannot be classified as "unauthorized"; and may not therefore form the basis of an AWOL determination.[24]

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[16] Employee's Reply Brief, *supra*, at Exhibit 21.
[17] Agency's Answer, *supra,* at Exhibit 15.
[18] *Id*. at Exhibit 16.
[19] *Id*. at Exhibit 17.
[20] Petition for Appeal (September 3, 2014); *See also* Employee's Reply Brief.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id.*

In her Petition for Appeal, Employee also argues that she never received the Advanced Written Notice or other notices as alleged in the September 3, 2014, removal letter. She also notes in her brief that she did not receive the Advanced Written Notice or the Final Notice, leaving her without notice that Agency was going to terminate her employment, and without the opportunity to respond to Agency's allegation.[25]

Employee maintains that Agency failed to comply with the strict notice requirements of DPM §§ 1608.1(a) and 1608.7. Employee contends that Agency has not, and cannot provide evidence that Employee received the notices. Agency only provided a print out of a federal express confirmation sheet showing that the Advanced Written Notice was delivered to Employee's address, but did not request nor contain her signature confirming delivery or receipt.[26] Employee additionally maintains that Agency's proof of delivery of the Final Notice consists solely of several documents showing that the Final Notice was delivered to Employee's address. She highlights that Agency cannot credibly state that either the Advanced Written Notice or the Final Notice were delivered to Employee. For these reasons, Employee asserts that she was never provided with the notice required by DPM § 1608.7, therefore, her termination was improper under District laws.[27]

Employee asserts that she was removed in retaliation for filing a discrimination complaint against Agency. She explained that she was discriminated and retaliated against by her direct supervisor, as well as Camille Williams. Employee maintains that her direct supervisor, Dr. Thompson, made direct discrimination statements that he was "mandated to remove anybody over the age of 40" and that "people need to make their mark and move on."[28]

Agency's Position

Agency asserts that Employee was properly removed for cause due to her failure to report to work or provide appropriate justification for her unauthorized absences. Agency explains that at no time did Employee inform Agency that she had a disability nor did she request for accommodation.[29] Agency asserts that Employee's complaints were related to her simple dissatisfaction with her new project assignment. Agency notes that it is uncontroverted that Employee was absent from work from July 28, 2014 to August 8, 2014. Agency also asserts that despite numerous requests from Agency to Employee, she has not provided any evidence whatsoever that her purported illness rendered her incapacitated during the period at issue, such that she was unable to perform her work or report for duty. Consequently, its decision to terminate Employee was taken for cause and supported by a preponderance of the evidence.

Agency states that while Dr. Prayaga's July 16, 2014, note stated that Employee would return to work on July 21, 2014, as well as Employee's email stating that she would return to work on July 21, 2014, Employee did not return to work as promised. Agency asserts that instead, on July 23, 2014, Agency received another note from Dr. Prayaga stating that Employee

[25] *Id.*
[26] *Id.*
[27] *Id*.
[28] *Id*.
[29] Agency's Answer.

remained under his care and upon her return, she would need the absence of unhealthy stress and a non-hostile working environment, but neither Employee nor Dr. Prayaga provided Agency with any explanation or clarifying information.

Furthermore, Agency notes that Employee was issued a notice of AWOL on August 7, 2014, and she responded on the same day via email, indicating that she received the notification and would be providing the requested documentation shortly. However, she never provided the proper documentation.

Agency contends that Employee's due process rights were not violated and that her statement that she did not receive the Advanced Written Notice is untrue, as Agency provided Employee with multiple notices of her unauthorized absences, as well as numerous opportunities to substantiate and restore her absences to approved leave, by providing appropriate documentation. Agency explains that the Advanced Written Notice was mailed to Employee's last known address on August 19, 2014, with same day delivery by Federal Express ("FedEx") and the United States Postal Services ("USPS"). Agency highlights that it was Employee's responsibility to update her address in PeopleSoft if her address had changed. FedEx delivered the Advanced Written Notice on August 19, 2014. The USPS attempted delivery and left a delivery notice at Employee's address. Agency asserts that Employee failed to respond to the Advanced Written Notice or request additional time. For these reasons, Agency notes that Employee's due process violation claims that she did not receive the Advanced Written Notice is simply incredible and must be rejected.

Additionally, Agency states that upon receiving the Advanced Written Notice, Employee did not request FMLA leave which had been previously offered to her on more than one (1) occasion or provide documentation addressing her AWOL status. Instead, she applied to donate leave through the leave donation program.

Agency further contends that its removal of Employee did not constitute retaliation. The decision to remove Employee was solely attributed to Employee's failure to provide information to substantiate her unauthorized absences and Agency needed to move expeditiously with the implementation of key programs and services. Agency highlights that Employee failed to provide a legitimate excuse for her absence, as neither Dr. Prayaga's notes nor Employee's age discrimination claim offer a legitimate excuse for Employee's failure to report to work for the period which gave rise to the adverse action. Agency further states that, irrespective of Employee's retaliation and discrimination claims, Employee did not report to work for over ten (10) consecutive days and failed to provide justification for her absence. Agency maintains that this establishes cause for adverse action under District laws. Citing to other OEA cases, Agency notes that OEA does not have jurisdiction over retaliation and discrimination claims, and Employee's legal recourse with respect to these issues is with the federal courts and not OEA. Thus, Agency notes that for the above reasons, Employee's claim of retaliation and discrimination is without merits.

With regards to penalty, Agency contends that Employee was charged with unauthorized leave for her failure to report to work from July 28, 2014, to August 8, 2014. Pursuant to the Table of Appropriate Penalties ("TAP"), the penalty for the first offense of unauthorized leave is

nothing less than removal. Consequently, Agency asserts that its decision to remove Employee is within its discretion and in accordance with District laws. Agency additionally notes that there are no genuine material issues of fact in this matter as Employee was absent from work for ten (10) days and failed to provide a legitimate excuse for said absences. Accordingly, Employee's termination should be upheld as Agency had cause to take the adverse action and the penalty of removal is reasonable and within Agency's discretion.[30]

1) Whether Employee's actions constituted cause for discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §§1603.3(f)(1),(2), the definition of "cause" includes [a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include, unauthorized absences and Absent without official leave. Here, Employee's removal from her position at Agency was based upon a determination by Agency that Employee was not fit to serve in her current position because she was absent from work for ten (10) or more consecutive days without official leave.

Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Unauthorized Absences and Absent without official leave (AWOL)

In the instant case, the undersigned must determine if the evidence that Employee was absent from work for ten (10) or more consecutive day is adequate to support Agency's decision to terminate Employee. In such cases, "[t]his Office has consistently held that when an employee offers a legitimate excuse, such as illness, for being absent without leave, the absence is justified and therefore excusable."[31] Additionally, if the employee's absence is excusable, it "cannot serve as a basis for adverse action."[32] The relevant time period in this matter is July 28, 2014 to August 8, 2014. Employee was absent from work during this period. Employee provided several doctor's notes in justification for her illness. These notes stated that Employee was suffering from work related stress and undergoing treatment.

The July 23, 2014, note from Dr. Prayaga, which Agency acknowledged that it received, stated that Employee "was advised *not to return to work on Monday, July 28, 2014, as had been stated*. Please note that a non-hostile working environment and the absence of unhealthy stress is imperative upon her return. She remains in my care until further notice (*emphasis added*)."[33] While on its face, this note appears to be relevant because it states the start of the period at issue – July 28, 2014, I find that the mention of July 28, 2014, in this note was a typographic error on the part of Dr. Prayaga. In his note dated July 14, 2014, Dr. Prayaga stated that "…prescription

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[30] *Id. See also* Agency's Brief (August 12, 2015).
[31] *Murchinson v. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005); *citing Employee v. Agency*, OEA Matter No. 1601-0137-82, 32 D.C. Reg. 240 (1985); *Tolbert v. Department of Public Works*, OEA Matter No. 1601-0317-94 (July 13, 1995).
[32] Murchison,*supra*, *citing Richard v. Department of Corrections*, OEA Matter No. 1601-0249-95 (April 14, 1997); *Spruiel v. Department of Human Services*, OEA Matter No. 1601-0196-97 (February 1, 2001).
[33] Agency's Answer, *supra,* at Exhibit 9.

medication and the time spent away from the office has reduced the job related stress. I remain guarded, but I do not believe the symptoms will return. Therefore, *I will be releasing her to return to work on Monday, July 21, 2014* (emphasis added)."[34] This note was followed by the July 23, 2014, note, and it was the only note that released Employee to return to work. The July 23, 2014, note was a follow-up to the July 14, 2014, note releasing Employee to return to work on July 21, 2014. Therefore, it can be reasonably inferred from reading both notes that the July 28, 2014, referenced by Dr. Prayaga in his July 23, 2014, note was a result of a typographic error and as such, the simple mention of July 28, 2014, would not be used to decide the issue at hand.

Nonetheless, Dr. Prayaga also stated in his July 23, 2014, note that Employee "was advised *not to return to work on Monday, July 28, 2014*, as had been stated. *Please note that a non-hostile working environment and the absence of unhealthy stress is imperative upon her return. She remains in my care until further notice* (*emphasis added*)."[35] When considered together, I find that all four (4) notes from Dr. Prayaga established a legitimate excuse for Employee to be absent from work without leave. Dr. Prayaga stated in the July 1, 2014, note that Employee was under his medical care. Although he released Employee to return to work in his July 14, 2014, note, Dr. Prayaga stated that "…prescription medication *and the time spent away from the office has reduced the job related stress. I remain guarded*, but I do not believe the symptoms will return (*emphasis added*);" Furthermore, Dr. Prayaga's July 23, 2014, note highlights in part that Employee "*was advised not to return to work* on Monday, July [21], 2014, as had been stated…she remains in my care until further notice." Clearly, as of July 23, 2014, up until when Employee was terminated on September 3, 2014, Employee had not been released to return to work and she remained under her doctor's care from that period onwards, which includes the July 28, 2014 through August 8, 2014, time period.

Moreover, Dr. Prayaga noted in his note signed August 11, 2014, in response to Agency's request for documentation that Employee "was still under my care from July 28, 2014 through August 8, 2014."[36] He also stated in his affidavit to this Office that he was treating Employee for anxiety and panic attacks which she suffered as a result of job-related stress and a hostile work environment during the relevant time period.

Agency argues that Employee did not submit sufficient documentation to establish a continued impairment from the period of July 28, 2014, through August 8, 2014. However, Agency's August 7, 2014, letter simply informed Employee that she would be placed on AWOL due to the fact that Agency had not received medical documentation from her physician coving the period of July 28, 2014, through August 8, 2014, establishing a continued impairment that prevents Employee from carrying out her essential job functions.

Furthermore, I find that Employee's Psychiatrist, Dr. Prayaga provided Agency with multiple documentations highlighting Employee's illness and the cause of the illness. Dr. Prayaga stated in his July 23, 2014, letter that Employee was "advised not to return to work on Monday, July [21], 2014, as had been stated…she remains in my care until further notice." Although the Doctor's note does not specify when Employee would return to work, it clearly

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[34] *Id* at Exhibit 7.
[35] *Id*. at Exhibit 9.
[36] Employee's Reply Brief at Exhibit 15 and 16.

proves that as of July 23, 2014, Employee was advised not to return to work until further notice and that her work environment was the reason for her illness. Moreover, Agency failed to specify the exact documentation it required and/or was seeking from Employee. Thus, I conclude that the July 23, 2014, as well as the August 11, 2014 note[37], put Agency on notice of Employee's illness, and were sufficient to establish Employee's continued impairment from June 2014, through August 8, 2014, which includes the relevant period in this matter.

Agency also asserts that despite numerous requests from Agency to Employee, she has not provided any evidence whatsoever that her purported illness rendered her incapacitated during the period at issue, such that she was unable to perform her work or report for duty. Employee on the other hand argues that her illness rendered her incapacitated. She explained that she was unable to work from July 28, 2014 through August 8, 2014, due to issues relating to depression, anxiety and stress caused by the hostile work environment that had been fostered by Agency.

Based on the documents on record, there is sufficient evidence that Employee's mental condition was so debilitating that it prevented her from performing her duties during the relevant time frame. I find that, unlike in *Murchison*, here, the record shows that Employee and her psychiatrist, Dr. Prayage, submitted sufficient documentations to address the severity of her mental condition and the extent to which it was exacerbated by her work condition. The record shows that: (1) Employee left work sick on June 23, 2014 and thereafter, was treated for anxiety and panic attacks; (2) her mental illness was a result of job-related stress and a hostile work environment; (3) she was prescribed medication for her condition; (4) her psychiatrist noted that time spent away from the office reduced the job related stress; (5) Employee's July 17, 2014, email to Dr. Thompson informed him of the issues leading to Employee's job related stress; (6) Employee's July 29, 2014, letter to Ms. Wright, Management Analyst, DCHR, stated that her physician is concerned about her return to work unless the issues regarding the hostile workplace environment are resolved; (7) Dr. Prayaga advised Employee not to return to work and informed Agency that Employee would remain in his care until further notice; (8) Dr. Prayaga also advised Agency that Employee needed a non-hostile working environment and the absence of unhealthy stress is imperative upon her return; and (9) there is no evidence in the record to show that Agency made any changes to accommodate Employee's need for a non-hostile working environment.

Based on the record and the foregoing, I find that Employee's absences from July 28, 2014, through August 8, 2014, is excusable because of her mental illness, and she has provided sufficient documentation to establish a continued impairment that prevented her from carrying out her essential job functions. Accordingly, I further find that Agency does not have sufficient evidence to support this cause of action; therefore, I conclude that, this cause of action should be overturned.

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[37]Agency does not acknowledge receipt of the August 11, 2014, note. This note was in response to Agency's August 7, 2014, letter to Employee requesting that she submit documentation establishing a continued impairment covering the period of July 28, 2014, through August 8, 2014. Further, I find that a one (1) day turn around period to obtain medical documentation is not practicable and an unreasonable request from Agency, especially giving the fact that Agency was probably aware that Employee would have to make an appointment to see her physician and request the required medical documentations.

Furthermore, DPM § 1268.2 provides that "[a]n agency head is authorized to determine whether an employee should be carried as AWOL." Additionally, DPM § 1268.4 highlights that, "[i]f it is later determined that the absence was excusable, or that the employee was ill, the charge to AWOL may be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay, as appropriate." Here, Agency determined that Employee was AWOL for the period of July 28, 2014 through August 8, 2014. However, given the record, I find that Employee's absence was justified by her mental illness; the doctor's notes from Dr. Prayaga cover the relevant timeframe in this matter; Employee's absence is excusable and as such, the charge for AWOL during that timeframe can be charged against Employee's sick, annual leave, compensatory leave or as leave without pay as provided in DPM § 1268.4.

DCFMLA[38]

Employee also notes that her absence was excusable since she was under FMLA. To be eligible for DCFMLA, the employee has to have worked for the District of Columbia for one year without a break in service, and has been paid for at least 1000 hours during the previous twelve (12) months prior to the request for DCFMLA.[39] Here, the record shows that Employee was eligible for DCFMLA during the period at issue. Although Employee was eligible for DCFMLA/FMLA, there is no evidence in the record to show that Employee actually applied, and was approved DCFMLA. The record reflects that Agency offered Employee on numerous occasions, the opportunity to apply for DCFMLA. Agency provided Employee with the required forms to apply for DCFMLA several times before its issuance of its August 7, 2014, letter. However, Employee did not avail herself to this opportunity. However, in an email dated August 22, 2014, Employee's attorney notified Dr. Thompson, Employee's supervisor, that Employee "has invoked her rights for leave under the District of Columbia Family and Medical Leave Act (the "DCFMLA")….any adverse employment decision made against Ms. Butler will be deemed to be retaliatory in nature – a violation of both the DCFMLA and [Age discrimination in employment act]."[40] Agency on the other hand states that upon receiving the Advanced Written Notice, Employee did not request FMLA leave which had been previously offered to her on more than one (1) occasion.

In its July 1, 2014, letter to Employees, Agency provided her with the necessary information to apply for DCFMLA, along with information on whom to contact if she was interested in applying for DCFMLA. Employee was also advised to return the included DCFMLA forms no later than July 9, 2014. Again on August 7, 2014, Agency encouraged Employee to apply for, and take advantage of FMLA to protect her job. Apart from the August 22, 2014, email from Employee's attorney stating that Employing is invoking her rights under FMLA, there is nothing in the record to show that Employee submitted an official application for DCFMLA. Moreover, Chapter 4 of the District of Columbia Municipal Regulations ("DCMR") § 1614.6 as follows:

> For purposes of the District of Columbia government, each employee *must* provide notice to their FMLA Coordinator or designee. An employee's contact

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[38] DCFMLA and FMLA will be used interchangeably throughout this decision.
[39] 4 District of Columbia Municipal Regulations ("DCMR") § 1603.
[40] Employee's Reply Brief at Exhibit 21,

> with the District of Columbia Department of Human Resources, if that agency is not the employer agency, *shall* not constitute the required notice under this section (emphasis added).

Here, Employee was provided with information in the July 1, 2014, letter of whom to contact (Glendora Meyers) if she was interested in DCFMLA. However, she failed to do so. Instead, her attorney emailed Dr. Thompson, Employee's supervisor, on August 22, 2014, notifying him that Employee was invoking her rights under FMLA. Based on 4 DCMR 1614.6, I find that contact with anyone other than the FMLA Coordinator or designee, in this case, Glendora Meyers, does not constitute the required notice. Consequently, I find that Employee was not covered by DCFMLA at the time of her removal.

Advance Written Notice

Employee asserts that Agency violated her due process rights. She maintains that Agency failed to comply with the strict notice requirements of DPM §§ 1608.1(a) and 1608.7. Employee contends that Agency has not, and cannot provide evidence that Employee received the notices.

DPM § 1608.1 (a) provides as follows:

> Except in the case of a summary suspension action pursuant to § 1615 or a summary removal action pursuant to § 1616, an employee against whom corrective or adverse action is proposed shall have the right to an advance written notice, as follows:
>
> (a) In the case of a proposed adverse action, an advance written notice of fifteen (15) days.

In the current matter, Agency's decision to terminate Employee is considered an adverse action; therefore, Employee is entitled to at least fifteen (15) days advanced written notice. Agency issued the advanced written notice on August 18, 2014, and the termination was effective September 3, 2014. August 18, 2014, to September 3, 2014, constitutes more that fifteen (15) days of notice. Accordingly, I find that, contrary to Employee's assertion, Agency did not violate DPM § 1608.1 (a).

However, DPM § 1608.7 highlights that:

> If the employee is not in a duty status, i.e., at work, the notice of proposed action *shall* be sent to the employee's last known address by *courier*, or by c*ertified* or *registered mail*, *return receipt requested* (emphasis added).

Furthermore, in *Aygen v. District of Columbia Office of Employee Appeals*,[41] the D.C. Superior Court found that where an employee is in duty status, "the notice of final decision must [be] delivered to the employee on or before the time the action is effective, *with a request for*

[41] No. 2009 CA 006528; No. 2009 CA 008063 at p. 9 (D.C. Superior Ct. April 5, 2012).

employee to acknowledge it" (emphasis added). The Court noted that if the employee refused to acknowledge receipt, a signed written statement by a witness may be used as evidence of service.[42] Additionally, the Court found that where an employee is not in duty status, the notice "must be sent to employee's last known address by courier, or by certified or registered mail, *return receipt requested*, before the time of the action becomes effective" (emphasis added).[43] The court further explained that "a dated cover letter, by itself, was insufficient evidence" of a mailing date or proof of receipt by an employee.[44]

Here, Employee was not at work on August 18, 2014, when the advanced written notice of proposed removal was issued. Agency asserts that it mailed the notice to Employee's address on file via FedEx same day delivery service with order confirmation on August 19, 2014. Agency further asserts that the mail was delivered to Employee on the same day. Employee argues that she did not receive the advanced written notice. Pursuant to DPM § 11608.7, delivery by FedEx does not constitute appropriate service. Agency was required to serve Employee by use of a courier, certified or registered mail, with return receipt requested, and it failed to comply. Moreover, an attempt by the undersigned to verify the tracking information provided by Agency was unsuccessful.[45]

Agency also noted that it mailed the notice using USPS certified mail service, which meets the requirements of DPM § 1608.7 and the ruling in *Aygen*. Agency provided the undersigned with a USPS certified mail receipt, along with the tracking information. According to the tracking information provided by Agency, the August 18, 2014, Advance Written Notice arrived at the USPS facility on August 20, 2014. USPS attempted to deliver the Notice on August 21, 2014, but no authorized recipient was available. A notice was left at the address, and because the mail was never picked up from USPS, it was returned to the sender in September 2014. According to DPM § 1608.5;

> The first day of the notice period *shall* be the day following the date on which service is made to the employee, either in person, by courier, or by certified or registered mail, *or the date on which service was attempted and refused* (emphasis added).

Based on the record, USPS attempted to serve Employee on August 21, 2015. Thus, pursuant to DPM § 1608.5, the notice period for the instant matter began on August 21, 2014, through September 3, 2014, the effective date of Employee's termination. August 21, 2014, through September 3, 2014, is fourteen (14) days. Because this period is less than the required fifteen (15) day notice, I find that Agency did not comply with the provision of DPM § 1608.1.

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[42] *Id*.
[43] *Id.*
[44] *Id*. at pp. 10-11.
[45] No information was found when the undersigned used FedEx tracking number 610402420541on FedEx.com to track the August 18, 2014, notice.

Discrimination and Retaliation

Employee further asserts that she was removed in retaliation for filing a discrimination complaint against Agency. Agency on the other hand contends that its removal of Employee did not constitute discrimination/retaliation. It explains that the decision to remove Employee was solely attributed to her failure to provide information to substantiate her unauthorized absences. To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) he engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act ("DCHRA"); (2) his employer took an adverse action against him; and (3) there existed a causal connection between the protected activity and the adverse personnel action.[46] A prima facie showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.[47] There is no dispute that Employee filed an EEOC claim against Agency for Age discrimination on August 22, 2014, or that her filing of an EEOC claim was a protected activity. However, the record suggests that Agency had commenced the adverse action process prior to Employee filing her EEOC claim for age discrimination. Agency notified Employee on August 7, 2014, that she would be placed on AWOL status. Thereafter, on August 18, 2014, Agency issued and subsequently mailed an Advanced Written Notice of Proposed Removal to Employee. Further, there is no dispute that Employee was absent from work from July 28, 2014 through August 8, 2014. All these events occurred prior to Employee filing a discrimination suit against Agency on August 22, 2012. Consequently, I find that there is no causal connection between Employee's EEOC appeal (protected activity) and her termination for AWOL (adverse action against Employee).

With regards to her discrimination claim, D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment…for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.[48] Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*[49] stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistle blowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation…"[50] In the instant case, Employee simply alleges that the her termination was based on discrimination. Moreover, Employee's claim as described in her submissions to this Office do not allege any whistle blowing activities as defined under the Whistleblower Protection Act nor does it appear to be retaliatory in nature. Additionally, Employee has already filed a

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[46] *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).
[47] *Id.*
[48] D.C. Code §§ 1-2501 *et seq.*
[49] 730 A.2d 164 (May 27, 1999).
[50] *El-Amin*; *citing Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

discrimination claim with the EEOC. Consequently, I find that Employee's claim falls outside the scope of OEA's jurisdiction.

2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[51] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. In the instant case, I find that Agency has not met its burden of proof for the above-referenced charges, and as such, Agency cannot rely on these charges in disciplining Employee.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of separating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee to her last position of record; or a comparable position; and
3. Agency shall reimburse Employee all back-pay and benefits lost as a result of the separation; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[51] *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).